

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 05-11682MLW

L & T YACHT SALES, INC.)
)
Plaintiff,)
VS.)
)
)
POST MARINE CO., INC.,)
)
Defendant)

POST MARINE CO.'S RESPONSE TO THE STATEMENT OF MATERIAL FACTS
PURSUANT TO RULE 56.1 IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

Pursuant to Local Rule 56.1 Defendant, Post Marine Co. hereby disputes the following material facts contained in the Statement of Material Facts Pursuant to Rule 56.1 in Support of Plaintiff's Motion for Partial Summary Judgment:

7. By the fall of 2002 Post knew this was not an isolated problem. Deposition of Kenneth Jensen, p. 24, ln. 12-15.

RESPONSE: Disputed. Kenneth Jensen's testimony at p. 24, lines 12-15 of his deposition that a problem with series 953 gel coat was not "isolated" refers specifically to the gel coat of a single boat, hull number 50-52, and not to the entire line of series 953 gel coat boats. Deposition of Kenneth Jensen, p. 24. lines 12-15. (Excerpts from the deposition of Kenneth Jensen are attached as Exhibit A hereto).

10. Post has characterized the problem as the "wholesale cracking" of the 953 gel coat. Deposition of Joseph Martorana, p. 12, ln. 19 - p. 13, line 1.

RESPONSE: The quoted portion of Joseph Martorana's testimony makes clear that

he was NOT characterizing the problem with 953 series gel coat as "wholesale cracking."

In fact he was commenting that there was no wholesale cracking. Deposition of Joseph Martorana, p. 12, line 19 - p. 13, line 1 (Excerpts from the deposition of Joseph Martorana are attached as Exhibit B hereto).

11. Nevertheless, Post continued to use the 953 gel coat to perform repairs on boats until 2005. Deposition of Kenneth Jensen, p. 40 P. 41 ln. 41.

RESPONSE: Series 953 gel coat was not used to repair L&T's boat. Jensen Deposition, Exhibit "A", p. 40, ln. 10-11. See Affidavit of Joseph Martorana attached hereto as Exhibit "C." At the time of his deposition, Mr. Martorana was asked what gel coat was used to repair L&T's boat, but he responded that he was unsure.

13. Boats repaired using the 953 gel coat have experienced additional cracking in the repaired areas. Deposition of Kenneth Jensen, p. 41, ln. 13-18.

RESPONSE: The quoted portion of Kenneth Jensen's testimony makes clear that only some boats have experienced additional cracking in the repaired areas. Jensen Deposition of Kenneth Jensen, Exhibit A, p. 41, ln. 13-18.

20. Before Post performed any repairs on L & T's boat, Todd Hamilton threatened to sue Post. Deposition of Todd Hamilton, p. 81, ln. 5-8.

RESPONSE: This statement is not supported by the record. Todd Hamilton's deposition is only 72 pages, including accompanying errata sheets. There is not a single reference made during the entire deposition concerning any communicated threat to sue Post.

21. In August of 2004, Post agreed to repair the gel coat on the boat. *See* letter of August 25, 2004 attached hereto as Exhibit E.

RESPONSE: This fact is disputed only insofar that the specific repairs Post was willing to perform are set forth in the letter itself, i.e. the letter speaks for itself. See, letter of August 25, 2004 attached as Exhibit D hereto.

23. Joseph Martorana clarified the letter of August 25, 2004 on September 2, 2004 by a further sent a letter to Todd Hamilton. This letter, Post states that the "[g]el coat will be removed from entire surfaces, examples being shelter sides, cockpit, forward deck, side decks, pulpit and hull to ensure consistency." See, September 2, 2004 letter, attached hereto as Exhibit F.

RESPONSE: This is denied insofar as the September 2, 2004 letter speaks for itself. See Exhibit E hereto. Further, the phrase "entire surfaces" means specifically the surfaces of the boat's affected areas, hence the plural of the word "surface." See Affidavit of Joseph Martorana, Exhibit "C" hereto.

26. Post did not strip the gel coat from the entire affected surfaces of the bottom of the boat, Deposition of Joseph Martorana, p. 19, ln. 11-15; the sides of the hull, p. 19, ln. 16-18; the bridge, p. 20, ln 3-7; the interior of the bridge, p. 20, ln 7-8; the hardtop p. 20, ln 12-13; or, the bottom of the boat, p. 21, ln. 14 - pg. 22, ln. 16.

RESPONSE: Denied. Post did strip gel coat from the entire affected surfaces. Post did not strip unaffected surfaces. Post did not strip the bottom of the boat because Mr. Hamilton ordered Post to cease all repair work and removed the boat from Post's facility before the bottom of the boat could be addressed. See Affidavit of Joseph Martorana, Exhibit C hereto.

27. Post never stripped the hull, Deposition of Cortez Marks, p. 19, ln. 14-16; the back bulkhead, p. 20, ln. 7-8; the dashboard, p. 20, ln. 22-23; or the hardtop, p. 20, ln. 24-25. Relevant excerpts from said transcript are attached hereto as Exhibit B.

RESPONSE: These areas were not stripped because there was no gel coat cracking in these areas. See Affidavit of Joseph Martorana, Exhibit C hereto.

28. Post never removed any gel coat from the bottom of L & T's boat. Deposition of Cortez Marks, p. 19, ln. 20-23.

RESPONSE: The bottom of L&T's boat was not addressed because Todd Hamilton ordered that all repair work on the boat cease. He then removed the boat from Post's facility. See Affidavit of Joseph Martorana, Exhibit C hereto.

29. Post filled just the cracks on L & T's boat and sprayed and sanded over them. Deposition of Cortez Marks, p. 16, ln. 7-11.

RESPONSE: Post did more than just fill the cracks, spray and sand over them. In fact, Post ground out the cracks first, and then filled them before spraying and sanding them over. See Deposition of Cortez Marks, p. 16, ln. 9-11, attached hereto as Exhibit F.

31. Post used more of the 953 gel coat to perform repairs to L & T's boat. Deposition of Joseph Martorana, p. 26, ln. 9-16.

RESPONSE: Post used Interplastic gel coat to repair L&T's boat, not series 953 gel coat, except in one limited and specific area. See Affidavit of Joseph Martorana, Exhibit C hereto.

32. When Mr. Hamilton removed the boat from Post's facility in August of 2005, there were many areas where the gel coat had not been repaired. Deposition of Todd Hamilton, p. 16, ln. 9-20.

RESPONSE: Denied. Except for the bottom of the boat, which was not repaired because Mr. Hamilton ordered that all repair work on the boat cease so that he could remove the boat, all affected areas were repaired. Any areas where repair work was not

performed was because there was no gel coat cracking in those areas. See Affidavit of Joseph Martorana, Exhibit C hereto.

33. After having L & T's boat for 9 1/2 months, Post now said that it would not strip the bottom or hull of the boat. Deposition of Todd Hamilton, p. 26, ln. 4-21.

RESPONSE: The only reason the bottom of the boat or any portion of the hull was not repaired was either because Mr. Hamilton ordered that all repair work on the boat cease, because he removed the boat from Post's facility, or because the gel coat had not cracked and was not in need of repair. See Affidavit of Joseph Martorana, Exhibit C hereto.

/s/ Howard M. Brown
Howard M. Brown, Esquire
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155 Federal Street, 9th floor
Boston, MA 02110
(617) 422-0200

SEGREDO & WEISZ
9350 South Dixie Highway
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Miami, Florida 33156
(305) 670-3820 Telephone
(305) 670-8230 Facsimile

By: /s/ Michel O. Weisz
Michel Ociacovski Weisz, Esquire
Florida Bar No. 336939
Attorney for Post Marine Co., Inc.

Dated July 13, 2007

EXHIBIT “A”

CONDENSED COPY

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
3 BOSTON DIVISION
4 C.A. NO. 05-11682 MLW

5
6 L & T YACHT SALES, INC.,
7 Plaintiff,

8 - vs -

9 POST MARINE CO., INC.,

10 Defendant.

11 -----

12
13
14 DEPOSITION OF: KENNETH JENSEN

15 WEDNESDAY, APRIL 11, 2007

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20 Atlantic City Court Reporting, LLC.

21 Certified Shorthand Reporters & Videographers

22 1125 Atlantic Avenue - Suite 416

23 Atlantic City, New Jersey 08401

24 (609) 345-8448

25 www.accourtreporting.com

\SEN - ZAJAC)

22

24

with

1 Q. And what size?

2 A. 50-foot.

3 Q. When was that boat manufactured?

4 A. 1998.

5 Q. What type of problems did the owner of
6 that boat encounter?

7 A. Just some unusual indiscriminate
8 cracking.

9 Q. And in 2002, was the person who brought
10 it to you the original owner of the boat?

11 A. Yes.

12 Q. When did Post become aware that this was
13 not an isolated problem with Boat 50-52?

14 A. In the fall of 2002, we saw a second
15 boat.

16 Q. What was the hull number of that boat?

17 A. Number 60. 50, Number 60.

18 Q. And did that boat have the same problems
19 as 50-52?

20 A. Similar.

21 Q. When was 60 manufactured?

22 A. '98, '99. I'm not sure.

23 Q. In the time line of Post becoming aware
24 of these problems, what happened next?

25 A. What do you mean?

ENSEN - ZAJAC)

38

repairs

- 1 Q. And is Post paying for that? 40
- 2 A. We're paying for part of it.
- 3 Q. Would those repairs require the removal
- 4 of a substantial amount of gel coat?
- 5 A. It would require the remove of some gel
- 6 coat. Yes.
- 7 Q. How much?
- 8 A. They need to -- let me backtrack just
- 9 one second. At the time that Mr. Mobarri's boat was
- 10 repaired, it was repair using 953 gel coat, okay? Mr.
- 11 Hamilton's boat was not repaired with 953 gel coat.
- 12 So the 953 gel coat on Mr. Mobarri's boat suffered a
- 13 second failure, okay? The boat is being sanded -- you
- 14 know, is to be sanded aggressively.
- 15 The people at Onset Bay felt they knew
- 16 how far they had to take it down and then it was going
- 17 to be Awl Gripped.
- 18 Q. And is it still at Onset Bay Marina for
- 19 repairs?
- 20 A. I'm not sure.
- 21 Q. For a period of time did Post use the
- 22 953 gel coat to perform repairs?
- 23 A. Yes.
- 24 Q. And during what period of time did Post
- 25 use 953 gel coat to perform repairs?

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41

1 A. Up until either late 2004 or early 2005.

2 Q. And what was the reason that Post
3 initially used 953 gel coat to perform those repairs?

4 A. The -- we had the people from CCP come
5 in and, you know, look at what was going on. They
6 assured us their product was good. They assured us
7 that, you know, how we were fixing the boats, that we
8 wouldn't have further problems.

9 Q. When did those conversations take place?

10 A. They took place during '04, '02 when
11 they came in. I'm not sure if we ever had them visit
12 us during '03.

13 Q. And subsequently did the repairs using
14 the 953 gel coat experience the same problems as?

15 A. Some did. Some haven't.

16 Q. Is that why Post no longer uses 953 gel
17 coat for repairs?

18 A. Yes.

19 Q. Do you know if Bill Catauro also went to
20 view Mr. Mobarri's boat?

21 A. He may have.

22 Q. For the second repairs done to Mr.
23 Mobarri's boat, were they only to fix the first
24 repairs or was there continued cracking in the other
25 areas that had not been repaired?

EXHIBIT “B”

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION
C.A. NO. 05-11682 MLW

5
6 L & T YACHT SALES, INC., :
7 Plaintiff, :
8 -vs- :
9 POST MARINE CO., INC., :
10 Defendant. :
11 - - - - -
12
13
14 DEPOSITION OF: JOSEPH MARTORANA
15 WEDNESDAY, APRIL 11, 2007
16
17
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21 Certified Shorthand Reporters & Videographers
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23 Atlantic City, New Jersey 08401
24 (609) 345-8448
25 www.accourtreporting.com

(MARTORANA - ZAJAC)

1 A. I thought it had better flexible
2 properties to it, and it was better -- it was priced
3 better. It was cheaper to be honest with you.

4 Q. Had Post already been receiving
5 complaints about boats with the 953 gel coat at that
6 time?

7 A. At what -- in 19 -- in 2002?

8 Q. Yes.

9 A. We had some boats, yes, but not -- yeah,
10 we did have some boats. Yes, I believe.

11 Q. Was it the complaints or was it the
12 better performance characteristics of the
13 Interplastic's at that time that made you select
14 Interplastic's over the 953?

15 A. It was my suspicion of the
16 characteristics of 953 and the better pricing of the
17 other gel coat and the better characteristics of the
18 other gel coat.

19 Q. Did you begin testing comparing the 953
20 to Interplastic's before or after Post received its
21 first complaint about cracking in the 953 gel coat?

22 A. I'm not sure of that. At the time, and
23 I'm talking about in 2000 -- the end of 2001, 2002, I
24 don't believe there was any type of -- there was no
25 wholesale cracking or problems that we had been aware

(MARTORANA · ZAJAC)

1 of with the 953.

2 We had areas, you know, up on like a
3 console or something like that that might have cracked
4 or a cockpit floor that might have cracked.

5 Q. Now, had there ever been -- strike that.
6 Let's go back.

7 What gel coat did Post use before the
8 953?

9 A. 952.

10 Q. And had you ever experienced problems
11 with cracking with the 952?

12 A. No, nothing that wasn't out of the
13 ordinary.

14 Q. When did you first realize that the
15 cracking with the 953 was out of the ordinary?

16 A. Probably started to suspect it to be out
17 of the ordinary in early -- well, 2003, I guess.

18 Q. At that time how many owners had
19 complained about cracking with their 953 gel coat?

20 A. I don't know that.

21 Q. Were you involved with regard to Mr.
22 Hamilton's boat?

23 A. Yes, I was.

24 Q. When did you first become aware that
25 there was a problem with his boat?

EXHIBIT “C”

Michel O. Weisz, Esquire
9350 South Dixie Highway
Suite 1500
Miami, Florida 33175
Tel: (305) 670-3820
Fax: (305) 670-82301

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**BOSTON DIVISION
C.A. No. 05-11682-MLW**

<u>L & T YACHT SALES, INC.</u>)	
)	
Plaintiff,)	
VS.)	<i>Filed Electronically</i>
)	
)	
<u>POST MARINE CO., INC.</u>)	AFFIDAVIT OF
)	JOSEPH MARTORANA
<u>Defendant</u>)	

BEFORE ME, the undersigned authority duly authorized to take oaths, personally appeared Joseph Martorana, who upon oath deposes and states:

1. My name is Joseph Martorana, I am over the age of 18 years of age, and I make this affidavit based upon my own personal knowledge of the facts set forth herein.
2. I am the Vice-President in charge of manufacturing of Post Marine Company and have been since 1997.
3. On or about September 2, 2004, I sent a letter to L&T Yachts Sales, Inc. wherein I stated: ATo clarify the letter sent to you from Michel Weisz. In making the repairs to your boat we will spray gelcoat in such a way to eliminate any spotting or

color variations in the areas to be repaired. Gelcoat will be removed from entire surfaces, examples being shelter sides, cockpit, forward deck, side decks, pulpit and hull to ensure consistency. @

4. The purpose of this letter was to make clear that the boat=s entire gel coat would not be replaced, only repaired in the affected areas.

5. Hence, when I refer to the boat=s Asurfaces@ this means the specific areas that are cracked and is why the word is in plural form.

6. In accordance with the August 25, 2004 letter sent by Mr. Weisz, and my own September 2, 2004 letter, certain repairs were made to L&T=s boat.

7. Most of the repairs performed to L&T=s boat were performed using gel coat manufactured by Interplastics. Gelcoat that is manufactured by Interplastics is not series 953 gelcoat.

8. Except for the bottom of the boat (which was not repaired because Mr. Hamilton ordered all repair work on the boat cease and because he removed the boat from Post=s facility), all surfaces experiencing gel coat cracking were repaired, as follows:

9. The entire shelter side surfaces were ground down to the laminate and re-sprayed with gel coat manufactured by Interplastics.

10. The entire windshield surface was ground down to the laminate and re-sprayed with gel coat manufactured by Interplastics.

11. The entire front deck was ground down to the laminate and re-sprayed with gel coat manufactured by Interplastics.

12. The entire cockpit side deck and coaming surfaces were ground down to the laminate and re-sprayed with gel coat manufactured by Interplastics.

13. The entire cockpit floor was ground down to the laminate and re-sprayed with gel coat manufactured by Interplastics.

14. The bridge floor, including aft floor was sanded aggressively and re-sprayed with gel coat manufactured by Interplastics.

15. The exterior of the bridge was lightly sanded and polished because it was not cracked.

16. The forward deck seat did not have cracks, but the non-skid was sanded off and Post reapplied non-skid at the customer=s request using gel coat manufactured by Interplastics.

17. The only area that series 953 gel coat was used was on the console to repair minor cracks from screws and cutouts and on the hull sides to repair isolated cracks in the vent areas.

18. Toe rails were ground to the laminate and re-sprayed using gel coat manufactured by Interplastics.

19. Areas of the boat unaffected by gel coat cracking were not repaired.

20. L&T Yacht Sales, Inc., through any of its agents or officers, including Mr. Hamilton himself, never communicated to me any threat that he would sue Post if repairs to the boat were not made.

FURTHER AFFIANT SAYETH NOT.



Joe Martorana

VERIFICATION

I verify that the foregoing statements made by me are true. Pursuant to 28 U.S.C. § 1746, I understand that I make this Verification under penalty of perjury.



Signature

JOSEPH MARTORANA
Print Name

VICE-PRES / MANUFACTURING
Title

7/10/07
Date

EXHIBIT “D”

SEGREDO & WEISZ

ATTORNEYS AT LAW

A Partnership Including Professional Associations

Michel O. Weisz, P.A.
Frank J. Segredo, P.A.

Suite 1500
9350 South Dixie Highway
Miami, Florida 33156
Telephone: (305) 670-3820
Facsimile: (305) 670-8230

FAXED
August 25, 2004

Delivered Via Fax
(617) 333-3203

Ms. Lisa A. Kane
77 Rocsam Park Road
Braintree, MA 02184

Re: Post Marine/Todd Hamilton

Dear Ms. Kane:

I have reviewed various items of correspondence concerning a Post yacht owned by your husband, Todd Hamilton. It is my understanding that your husband purchased the yacht in a used condition sometime in the early summer of 2003. The yacht is a 2001 model year vessel which had been sold by a Post dealer at retail to the original purchaser in early to mid 2001.

As you may be aware, all Post yachts are covered by a written limited warranty. The warranty in effect at the time the yacht was originally sold was for one year from date of sale. Thus the warranty expired well before your husband purchased the yacht. In addition, the warranty expressly disclaims coverage of gel coat. As I understand it, the current issues related to the yacht concern gel coat issues, which in my view are not covered by the warranty and for which Post Marine has no liability or duty.

Having said that, Post is willing as a matter of accommodation and customer good will to gratuitously undertake and perform repairs to the gel coat finish. This work will be done at no cost to your husband and will consist of the following:

Post Marine will inspect the entire vessel to determine the extent of the gel coat repairs to be performed. The areas affected will be treated in the following manner.

1. The engine room will be isolated by sealing the exhausts at the transom, sealing the hull side intake vents, sealing the cockpit hatches and engine room door,

Ms. Kane
Page 2
August 25, 2004

Re: Post Marine/Todd Hamilton

2. Bottom paint will be removed and the bottom will be inspected to locate any areas of gel coat cracking.
3. Topsides and hull sides will be covered prior to bottom sanding, the bottom will be sanded to remove gel coat in areas of cracking. Any hardware affected by stress cracking will be removed and reinstalled.
4. Epoxy barrier coatings will be applied within manufacturer specifications. Two coats of bottom paint will then be applied.
5. All necessary hardware will be removed and reinstalled to facilitate gel coat removal.
6. Gel coat will be sanded off using random orbital sanders, laminate will be inspected, and prepared for reapplication of gel coat.
7. The vessel will be taped off and covered in appropriate areas in preparation for spraying gel coat to proper specifications.
8. Once gel coat has been sprayed, it will be sanded to a 1200 grit finish in preparation for polishing.
9. Polishing will be completed and a coat of fiberglass gel coat resin cleaner-sealer will be applied.

Prior to delivery, the boat will be cleaned as we clean all new boats for customer pickup. Post Marine will make every attempt to complete these repairs in a timely manner and estimate the process will take approximately four months upon receipt of the vessel at our facility.

These repairs are made as an accommodation only and no warranty will be provided other than a 90 warranty of workmanlike performance which will cover only the workmanship of the application of the gel coat. No warranty will be extended with respect to the gel coat, its characteristics, color or finish.

Very truly yours,



Michel O. Weisz

EXHIBIT “E”



100 Post Road • Mays Landing, NJ 08330-1698 • (609) 825-2434 • Fax: (609) 825-2336 • www.postyachts.com

Todd Hamilton
Via FAX: 617-333-3203

Dear Mr. Hamilton:

To clarify the letter sent to you from Michel Weisz. In making the repairs to your boat we will spray gelcoat in such a way as to eliminate any spotting or color variation in the areas to be repaired. Gelcoat will be removed from entire surfaces, example being shelter sides, cockpit, forward deck, side decks, pulpit and hull to ensure consistency.

Sincerely,

Joseph Martorana
Vice President

EXHIBIT “F”

COPY

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
3 BOSTON DIVISION
4 C.A. NO. 05-11682 MLW

5
6 L & T YACHT SALES, INC.,

7 Plaintiff, :
8 - vs - :
9 POST MARINE CO., INC.,

10 Defendant. :
11 - - - - -
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14 DEPOSITION OF: CORTEZ MARKS
15 WEDNESDAY, APRIL 11, 2007
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(MARKS · ZAJAC)

1 sides of the boat?

2 A. Yes. As I remember, there might have
3 been either three or four cracks on the port side, and
4 maybe a couple small ones on the starboard side.

5 Q. And were those repaired?

6 A. Yes.

7 Q. What was the process of repairs that
8 were done to Mr. Hamilton's boat?

9 A. Well, that was ground out. The cracks
10 were ground out and filled with a filler, and then it
11 was sanded and sprayed and sanded out.

12 Q. Do you recall which gel coat Post used
13 to repair Mr. Hamilton's boat, the 953 or
14 Interplastic's or both?

15 A. I can't remember which one they used at
16 this time.

17 Q. Was there a period of time that Post was
18 using the 953 because the color blended well over --

19 A. Yes.

20 Q. -- 953?

21 A. Yes.

22 Q. And does Interplastic's blend less well
23 from a coloring standpoint?

24 A. Well, the two -- the two may not look
25 exactly the same if you patch with it. You'd have a